89-844

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHIGAN BELL TELEPHONE CO.,
PETITIONER

v.

BARBARA CLEARY,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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42 pp

QUESTION PRESENTED

Whether Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, preempts a state-law handicap discrimination claim based on an employer's alleged refusal to return an employee to work following a disability leave, when the alleged right to return to work is provided only by the collective bargaining agreement, not by state law.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

All of the parties to this case are listed in the caption. Petitioner Michigan Bell Telephone Co. is a wholly-owned subsidiary of American Information Technologies, Inc. ("Ameritech") and is an affiliate of Ameritech Services, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Michigan Bell Telephone Co. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is unreported. The order denying rehearing (App., *infra*, 5a) is unreported. The opinion and judgment of the district court (App., *infra*, 6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1989 (App., *infra*, 5a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties * * *.

Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. §173(d), provides in pertinent part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

Section 103(b)(i) of the Michigan Handicapper's Civil Rights Act, MCL 37.1103(b)(i); MSA §3.550(103)(b)(i), provides:

> "Handicap" means a determinable physical or mental characteristic of an individual * * * which characteristic * * * is unrelated to the individual's ability to perform the duties of a particular job or position, or is unrelated to the individual's qualifications for employment or promotion.

Sections 202(1)(b) and (c) of the Michigan Handicapper's Civil Rights Act, MCL 27.1202(1)(b) and (c); MSA §3.550 (202)(1)(b) and (c), provide that "[a]n employer shall not":

> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.
>
> (c) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise ad-

versely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

STATEMENT

This petition presents the issue of whether a purported state-law handicap discrimination claim based on the alleged denial of a contractual right to return-to-work at the conclusion of a one-year disability leave of absence, as provided by a collective bargaining agreement, is preempted by §301 of the Labor Management Relations Act, 29 U.S.C. §185. The ramifications of this issue are potentially broad because of the unique nature of handicap discrimination laws, as compared to other types of anti-discrimination laws, and the deleterious effect of allowing such laws to be "piggy-backed" on collectively bargained rights of accommodation that go beyond the requirements of state law. The relationship between handicap discrimination claims and contractual provisions regarding physical ability to work, medical restrictions, disability leave, accommodation, and return-to-work following a disability raises an important federal issue that this Court has not previously addressed, but that this Court's prior decisions suggest the Court of Appeals wrongly decided in a way that will have seriously harmful effects on collective bargaining and the integrity of contractual grievance arbitration procedures.

The state-law under which the plaintiff purports to proceed, the Michigan Handicappers Civil Rights Act ("HCRA"), MCL 37.1101 *et seq.*, has been interpreted by the Michigan state courts to *not* require employers to provide disability leave or a return-to-work following a disability. *Metro* v. *Ford Motor Company*, 169 Mich. App. 549 (1988) *vacated* 432 Mich. 886, 437 N.W.2d 634 (1989), *on rehearing* ___N.W.2d ___ (1989); *Cuffe* v. *General Motors Corp.*, 166 Mich. App. 766, 420 N.W.2d 874 (1988) *vacated* 432 Mich. 885, 437 N.W.2d 634 *on rehearing* 180 Mich. App. 394, ___ N.W.2d ___ (1989); *Desjardins* v. *The Budd Co.*, 175 Mich. App. 599 (1988). Thus, once the respondent in this case became disabled, as she admits she did, she lost any right to

continued employment under state law. In order to state a claim under the HCRA, she must rely on her purely *contractual* right to return-to-work following a disability leave of absence, which was itself granted solely pursuant to the collective bargaining agreement between Michigan Bell and respondent's union.

Because respondent is relying on a right provided only by a collective bargaining agreement, and would have to establish the existence and scope of that right as part of her purported state-law claim, that claim is preempted by Section 301. Any other result would conflict with the uniformity required in interpreting collective bargaining agreements and undermine the collective bargaining process by allowing employees to enforce rights granted by a collective bargaining agreement through a state-law tort or discrimination action.

The Facts of This Case. Respondent became employed by Michigan Bell in 1974 as a maintenance administrator, a non-management position, in which she was responsible for testing telephone circuits and completing basic output reports (App., *infra*, 2a).

On August 4, 1985, respondent was seriously injured in a traffic accident. As a result of her injuries, she was totally disabled and unable to perform her job as a maintenance administrator (App., *infra*, 2a). Rather than being terminated because of her inability to work, respondent was granted a disability leave of asbsence pursuant to the terms of the collective bargaining agreement between the Communication Workers of America ("CWA") and Michigan Bell. (App., *infra*, 2a). She received full disability benefits under the disability plan incorporated into the collective bargaining agreement (App., *infra*, 2a).

The collective bargaining agreement provides disability benefits for a maximum of 52 weeks. If an employee is unable to return to work after that time, he or she is removed from the disability rolls and their employment with Michigan Bell is terminated. (An employee may also be eligible for long-term disability benefits under certain circumstances.) (C.A. App, 48).

On March 18, 1986, respondent was informed that her disability benefits were to expire on August 10, 1986, and, if she was unable to return to work by that time, her employment would be terminated (*Id.*).

On August 6, 1986, respondent's doctor released her to return to work subject to the following physical restrictions: no lifting over ten pounds, no climbing stairs over one flight, restrictive walking with platform crutches, no excessive walking, bending, twisting or sitting, and no elevating to platforms or ladders (C.A. App, 49). Respondent presented herself to her supervisor, Jerome Malinowski, on the last scheduled work day before August 10, 1986. Malinowski decided that, because of the severity and scope of her physical restrictions, she could not adequately perform her former job as maintenance administrator (*Id.*). Pursuant to the special placement procedures instituted by Michigan Bell, a search was conducted for an available job that respondent could do, however, none was found (*Id.*).

Because of her inability to return to work within 52 weeks of the commencement of her disability, respondent's employment was terminated pursuant to the terms of the collective bargaining agreement (C.A. App, 6).

Respondent, through her union, filed a grievance under the collective bargaining agreement claiming that she had been terminated because of a handicap and that she should have been returned to her former position or an equivalent one (C.A. App, 79). That grievance proceeded through the entire grievance procedure, including an arbitration hearing before an independent arbitrator (C.A. App, 80). The arbitrator ultimately ruled that, although there was a substantial question regarding respondent's ability to work, she should have been granted an "experimental" return-to-work under the collective bargaining agreement. Respondent has since been reinstated to her former position with backpay (less offsets for wage loss benefits she received) to the date of her termination.

The Trial Court Proceedings. While her grievance was pending, respondent filed her complaint in this action in Wayne County Circuit Court alleging that Michigan Bell acted wrongfully in refusing to let her return to work from a disability leave of absence, and ultimately terminating her, because of her physical condition and medical restrictions (C.A. App., 4-9).

In addition to alleging a violation of the Michigan Handicapper Civil Rights Act ("HCRA"), respondent expressly alleged a breach of the collective bargaining agreement between respondent's union, the Communication Workers of America, and Michigan Bell (C.A. App., 8). Because respondent alleged the breach of a collective bargaining agreement, governed by §301 of the Labor Management Relations Act, 29 U.S.C. §185, Michigan Bell removed her complaint to federal court (C.A. App., 17-20). Respondent did not seek remand to state court.

The HCRA prohibits discrimination in employment on account of a "handicap," which is defined as a "determinable physical or mental characteristic" that "is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1103(b)(i) and 37.1202(1)(b), (c). In light of this definition, the Michigan Supreme Court has held that physical conditions that are "job related," and which therefore require "accommodation," are not "handicaps" subject to the protection of the HCRA. *Carr* v. *General Motors Corp.*, 425 Mich. 313, 389 N.W.2d 686 (1986).[1] Therefore, the Michigan

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[1] Following *Carr*, the Michigan Court of Appeals has held in three cases that handicap claims based on the denial of contractual rights to return to work following a disability are preempted by Section 301. *Desjardins* v. *The Budd Company*, 175 Mich. App. 599, 438 N.W.2d 622 (1988); *Metro* v. *Ford Motor Company*, 169 Mich. App. 549 (1988); *Cuffe* v. *General Motors Corp.*, 166 Mich. App. 766, 420 N.W.2d 874 (1988). An application for leave to appeal to the Michigan Supreme Court is presently pending in *Desjardins*. The Court of Appeals' decision in *Metro* and *Cuffe* were vacated by the Michigan Supreme Court and remanded to the Court of Appeals for reconsideration in light of *Lingle*, *infra*. 437 N.W.2d 634 (Mich. 1989). The Court of Appeals thereafter reaffirmed its Section 301 preemption holding in *Metro*, ___ N.W.2d ___ (Mich. App. Aug. 25, 1989), and *Cuffe*, ___ N.W.2d ___ (October 2, 1989) and the plaintiffs have re-applied for leave to appeal to the Michigan Supreme Court.

Bell collective bargaining agreement provision of disability leave and return to work following a disability exceeds any rights or duties created by the Michigan HCRA.

Accordingly, Michigan Bell filed a motion for summary judgment on the basis that respondent's HCRA claim for handicap discrimination was completely preempted by §301, and that respondent had failed to exhaust the grievance/arbitration procedure (App., *infra*, 2a). The trial court granted Michigan Bell's motion and dismissed the case. (App., *infra*, 7a). Respondent filed an appeal to the Sixth Circuit Court of Appeals.

The Sixth Circuit Decision. The Sixth Circuit panel rendered its decision on August 2, 1989 in a *per curiam* opinion. In its opinion, the Sixth Circuit relied on its recent 8-7 *en banc* decision in *Smolarek* v. *Chrysler Corp.*, 879 F.2d 1326 (6th Cir 1989) (in which a petition for certiorari is now pending) which it interpreted to have broadly held "that claims under the HCRA are not preempted by Section 301 as they do not necessitate interpretation of the collective bargaining agreement." (App., *infra*, 3a). Thus, the panel said, "even though the plaintiff has implicated the collective bargaining agreement," her HCRA claim "is, 'independent' of her rights under the collective bargaining agreement and is not preempted by Section 301," citing *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. ___, 108 S.Ct. 1877, 1882 (1988). (App., *infra*, 3a).

In reaching this decision, the court did not analyze the particular HCRA claim being asserted by the respondent, and did not acknowledge or discuss the limited nature of the rights granted by the HCRA. While acknowleding that respondent's disability leave was granted pursuant to the collective bargaining agreement (App., *infra*, 2a), the Court did not acknowledge or discuss the fact that her alleged right to return-to-work following her disability was also created by, and dependent on, the collective bargaining agreement.

REASONS FOR GRANTING THE PETITION

Over the past several decades the Court has repeatedly held that disputes between employers and employees directly relating to the terms and conditions set forth in their collectively bargained labor contracts must be governed by a uniform body of federal law, with resolution of such disputes through contractual grievance arbitration procedures. The court of appeals' decision in this case permits respondent and countless similarly situated employees to bypass or supplement available grievance procedures, and challenge their employers' actions concerning matters governed by a collective bargaining agreement in court, simply by labeling their contract dispute as a "handicap discrimination" claim.

The court of appeals' ruling thus conflicts with federal labor policy mandating that labor contract disputes be resolved in accordance with uniform federal laws and pursuant to grievance arbitation procedures. The court of appeals decision cannot be squared with this Court's decisions in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386 (1987); *Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987), or *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. ___, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). The respondent's claim is *directly* founded on the collectively bargained right to return-to-work following a disability leave of absence. There is no parallel right under state law and respondent must establish the existence and applicability of her contractual right to return-to-work in order to pursue her state-law discrimination claim. Her claim fits precisely within this Court's statement in *Lingle* that a state-created remedy, "although nonnegotiable," is preempted by Section 301 if it "turn[s] on the interpretation of a collective-bargaining agreement for its application." 108 S.Ct. at 1882 n.7. Respondent's HCRA claim is an archetypal example of a state-created "discrimination" claim that must be held preempted because it is founded directly on a collectively bargained right and, therefore, requires contract interpretation for its resolution.

The lower courts have struggled with the proper application of *Lueck* and its progeny in cases involving a variety of state-law theories. The 8-7 split of the *en banc* Sixth Circuit in *Smolarek*, on which the panel in this case exclusively relied, demonstrates the confusion in this area and the need for guidance from this Court, as does the 4-3 split of the Wisconsin Supreme Court on a similar Section 301 preemption issue in *IAM Local 437* v. *United States Can Co.*, 441 N.W.2d 710 (Wisc. 1989). Handicap discrimination claims present particularly vexing problems because they involve physical ability to work which is frequently the subject of extensive, collectively-bargained procedures for determining physical condition, medical restrictions and special accommodation. Because of the unique nature but potentially broad effect of the problems raised, review of the preemption issue by this Court in the particular context of handicap discrimination claims is required.

I. The Court of Appeals Has Wrongly Decided An Important Federal Question That Threatens Federal Labor Policy And Requires Review By This Court.

A. Handicap Discrimination Claims Raise Special Problems Of Section 301 Preemption That Have Not Been, But Should Be, Decided By This Court.

Handicap discrimination laws are different than other anti-discrimination statutes because they do not prohibit the consideration of physical and medical conditions in employment decisions. Indeed, they necessarily recognize that physical condition *is* a relevant consideration in employment as long as it is job-related. *Carr, supra.* Of course, the nature of a physical restriction must be assessed and compared to the physical requirements of a particular job before it can be determined whether a physical condition is job-related. Thus, handicap laws are fundamentally different than statutes that prohibit *any* consideration of certain immutable characteristics, such as race, sex, or national origin in employment decisions.

This distinction has great importance in the area of collective bargaining and Section 301 preemption of state-law claims be-

cause, under handicap discrimination laws in general and the Michigan HCRA in particular, it is entirely appropriate for employers and unions to negotiate procedures for determining medical restrictions, job-relatedness, disabilities, reinstatement procedures, etc. Employers and unions can, and almost always do, include provisions in their collective bargaining agreements as to how such conditions will be determined and how disputes about such matters will be resolved.

Not only must employers and unions inevitably address physical conditions and restrictions in collective bargaining agreements — they often do so by creating *favored* treatment exceeding that required by state handicap laws. See 2 Bureau of National Affairs, *Collective Bargaining Negotiations And Contracts, Basic Patterns In Union Contracts*, 75:4 (1989) (33 percent of all collective bargaining agreements, and 44 percent in the manufacturing sector, grant special rights to employees no longer able to perform their regular work). That type of *favored* treatment is precisely what Michigan Bell and the CWA negotiated here with respect to disability leaves and returns-to-work. Because the denial of contractually-created *favored* treatment is at issue, rather than adversely discriminatory treatment, "handicap discrimination" claims like the one asserted here are far different from typical disparate treatment discrimination claims and raise different preemption issues.

Forty-five states and the District of Columbia have enacted statutes prohibiting handicap discrimination. See Note, *Employee Drug Testing*, 74 Va. L. Rev. 969, 986 n.112 (1988). Most of these statutes define "handicap" very broadly to include even temporary medical conditions, such as illness or injury, but at least ten of these statutes, like Michigan's, do not require accommodation of job-related handicaps.[2] The court of appeals' *per se*

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[2] See Ind. Code §22-9-1-13 (1971); Neb. Rev. Stat. §48.1101 *et seq.*; Ga. Code Ann. §66-504 (1979); Kan. Stat. Ann. §44-10 (1986); Ky. Rev. Stat. Ann. §207.130 (1976); N.H. Rev. Stat. Ann §354-1 (1977); S.D. Laws §20-B-1 *et seq.* (1986); S.C. Code Ann. §43-33-60 (1983); Tex. Hum. Res. Code Ann. §121.001 (Vernon 1980) Nev. Rev. Stat. §613.310 *et seq.* (1987).

rule that no handicap discrimination claim is ever preempted by Section 301, even when based on contractual rights to *favored* treatment of temporarily disabling medical conditions that go beyond anything required by state handicap laws, threatens the collective bargaining process in a broad area of traditional and legitimate bargaining. It threatens the very rights to favored treatment on which such claims are based.

The claim in this case is based on a medical condition which, by the respondent's own admission, caused disability and resulted in medical restrictions on her ability to work. The Michigan Bell/CWA collective bargaining agreement, like many mature CBA's, provides certain rights of accommodation in such cases and contains detailed, negotiated provisions for determining disabilities and medical restrictions (usually by independent medical examinations) and procedures for return-to-work following a disability. Decisions made under these negotiated procedures are subject to the grievance/arbitration procedure, and it was clearly intended that disputes relating to such decisions would be resolved through that procedure.

The panel decision in this case will ultimately lead to the erosion and destruction of such collectively bargained rights and procedures, a foreseeable consequence which this Court sought to avoid by its decision in *Lueck*. See 471 U.S. at 219. Because the HCRA applies broadly to any physical or mental condition, virtually any employee subject to medical restrictions can circumvent the contractual procedures for making determinations about such matters by filing a claim for so-called "handicap discrimination." The dispute in such cases is not about the employer's alleged "discriminatory" motive, but about whether the contractual procedures resulted in the "correct" decision regarding the employee's medical restrictions, ability to work and entitlement to the special contractual benefits, such as a preferential return-to-work, that are actually at issue. Such contract disputes must be resolved through the grievance/arbitration procedure, not a state lawsuit for "discrimination".

To allow a dispute about the denial of purely voluntary, contractual benefits to be resolved under state law outside of the labor contract seriously undermines the grievance/arbitration procedure. It would discourage employers from conferring voluntary benefits, beyond those mandated by law, because by doing so, the employer opens itself not only to contractual claims, but also to non-contractual state law claims that would not otherwise exist. The employer could no longer be certain what it had agreed to do, because the question of whether a particular employee was entitled to the contractual benefit in question would be resolved, not through the grievance/arbitration procedure, but through state law claims charging discrimination or some other state tort. State judges and state court juries would be interpreting the collective bargaining agreement under state law to determine whether a plaintiff was discriminatorily denied a benefit to which he or she was *contractually* entitled.

This danager is particularly great in the area of state handicap discrimination laws. Such laws, if held to be "per se" *not* preempted, as the panel's decision does, could potentially completely displace collectively bargained procedures for determining whether an employee has a medical condition, what the physical requirements of a particular job are, and what restrictions are appropriate for a particular medical condition. Any employee feeling aggrieved by decisions made under the contractual procedures or wishing to obtain an additional remedy beyond that provided by the contract, could circumvent the grievance/arbitration procedure by filing a state action alleging "handicap discrimination," even though there is nothing discriminatory or illegal in the contractual procedures and even though state law does not independently provide the favored treatment provided by the labor contract. In such cases, the employee is simply challenging the correctness of the decision made about her entitlement to a purely contractual benefit, and the employee should be limited to her contractual remedy.

B. This Court's Prior Decisions Require That State Law Claims Based On The Denial Of Contractually Created Rights And Benefits Be Preempted By Section 301.

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(1), creates federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in any industry affecting commerce * * *." In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), this Court held that Section 301 is not merely a jurisdictional statute but rather it "expresses a federal policy that federal courts should enforce these [collective bargaining] agreements" and that "the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 455, 456. Accordingly, in defining rights and responsibilities in the labor context, "[f]ederal interpretation of the federal laws will govern, not state law." *Id.* at 457.

The Court examined the reason for this rule in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). "The dimensions of §301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by §301 to be decided according to the precepts of federal labor policy." *Id.* at 103. Disputes over the meaning of a collective bargaining agreement therefore cannot be left to state law because "the subject matter of §301(a) 'is peculiarly one that calls for uniform law.' " *Id.* As the Court further explained:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult * * *. *Id.*

In short, "in enacting §301, Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour*, 369 U.S. at 104. Indeed, the "pre-emptive force of §301 is so powerful as to displace entirely *any* state cause of action" that contends, explicitly or implicitly, that an employer breached its obligations under a labor contract. *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust*, 463 US. 1, 23 (1983) (emphasis added). "[A]ny complaint that comes within the scope of the federal cause of action" — even though "pleaded [as] an adequate claim for relief under * * * state law" and even though seeking "a remedy available *only* under state law" — is "purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of §301." *Id.* at 23-24. See also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 55-56 (1987).

In the last five years this Court has issued a series of opinions that have applied these principles of federal labor policy to a variety of state-law claims. None of these cases have dealt specifically with a state law discrimination claim, nor have they dealt with the special aspects of handicap discrimination claims based on collectively-bargained rights to favored treatment. Nevertheless, these cases clearly suggest that the court of appeals erred in this case.

In *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), an employee brought a tort action for "bad-faith" in Wisconsin state court, contending that his employer had "intentionally, contemptuously, and repeatedly failed" to make disability insurance payments under a collectively bargained disability plan. *Id.* at 206. This Court unanimously held that the addition of a motivational factor (e.g., bad faith) to a contract-based claim did not avoid preemption under Section 301. *Id.* at 211. The Court held that the employee's state-law tort suit was preempted by Section 301 because "any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 218.

The Court in *Lueck* recognized that, if state law were allowed to determine the meaning of collectively bargained con-

tract language, "all the evils addressed in *Lucas Flour* would recur" (*Id.*):

> The parties would be uncertain as to what they were binding themselves to when they agreed to create a right * * *. As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate.

Importantly, the Court reasoned that preempting Lueck's tort claim was the *only* result that "preserves the central role of arbitration in our 'system of industrial self-government,' " *id.* at 219, citing *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). The Court cautioned that '[p]erhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement." *Id.* at 219. The Court concluded:

> A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 (1965), as well as eviscerate a central tenet of federal labor-contract law under §301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance. *Id.* at 220.

This Court next addressed these Section 301 policy issues in *Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987). In that case an injured bargaining unit employee sued her union under a state-law tort theory, claiming that it had breached a duty to ensure safety in the workplace. *Id.* at 853. She asserted that liability would simply turn on state-law negligence principles. *Id.* at 854-855. This Court unanimously disagreed. After re-examining the policy underpinnings of *Lucas Flour* and *Lueck*, the Court held that the alleged duty of the union arose, if at all, from the collectively bargained agreements between the union and the employer, and that "questions of contract interpretation . . . underlie any finding of tort liability.' " *Id.* at 862.

In *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386 (1987), this Court, while holding that claims for breach of alleged *individual* employment contracts are not preempted by Section 301, expressly stated that state-law claims founded directly on rights created by a collective bargaining agreement *are* preempted:

> Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims "substantially dependent on analysis of a collective-bargaining agreement." *Id.* at 394.

The Court observed that "[w]hen a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim * * *," *Id.* at 399, and that, citing *Avco Corp.* v. *Aero Lodge No. 735,* 390 U.S. 557 (1968), '[s]tate law does not exist as an independent source of private rights to enforce collective bargaining contracts." *Id.* at 394.

Last year, in *Lingle* v. *Norge Division of Magic Chef,* 486 U.S. ___, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), this Court reaffirmed the federal labor policies upon which *Lueck, Hechler,* and *Caterpillar* were grounded, but ruled that a state retaliatory discharge claim, *not founded on any collectively bargained right,* fell outside the rationale and holding of those cases because "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* at 1882 (footnote omitted). Thus, while a mere "parallel" factual analysis between a labor contract claim and a state-law claim would be insufficient to produce Section 301 preemption, *id.* at 1883, this Court emphasized that a state-law remedy, "although nonnegotiable," could "nonetheless turn [ ] on the interpretation of a collective-bargaining agreement for its application," or that "a law appli[cable] to all state workers" could require, "at least in certain instances, collective-bargaining agreement interpretation" — and in both situations the state-law remedy would be preempted by Section 301. *Id.* at 1882 n.7.

The Court in *Lingle* reiterated the admonition in *Lucas Flour* and *Lueck* that "[a] rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor contract law under §301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance," *id.* at 1884, citing *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29 (1987), and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Its decision in *Lingle*, the Court concluded, "should make clear that interpretation of collective bargaining agreements remains firmly in the arbitral realm." *Id.*

C. Respondent's Handicap Discrimination Claim Is Directly Based On A Contractual Right And Must Be Preempted By Section 301.

It is plain in this case that respondent is asserting an alleged right to return-to-work following a disability leave of absence in asserting her HCRA claim. Although she has asserted that she was "terminated" because of her handicap, the gravamen of her complaint is that Michigan Bell "refused to allow [her] to return to her [previous job]" and "failed to allow [her] to return-to-work and failed to provide [her] with work * * *" (C.A. App. 6-7; Complaint ¶'s 12 and 18). The "termination" was simply the inevitable result of the alleged refusal to allow her to return to work after respondent had exhausted her one-year disability leave under the collective bargaining agreement.

It is equally clear that the respondent's alleged right to "return-to-work" after she became disabled arises from the collective bargaining agreement, not the Michigan HCRA. The Michigan Court of Appeals, in considering a disabled employee's claim under the HCRA that he should have been given the opportunity to return-to-work after he was no longer disabled, said:

> [I]t is clear from the complaint in the instant case that Plaintiff's disability prevented him from fulfilling the require-

> ments of his job at the time of his discharge. Hence, it cannot be said that the handicap was unrelated to employment. *Plaintiff's alleged subsequent recovery from his medical disability and regained ability to perform the job does not alter this conclusion. Wilson* v. *Acacia Park Cemetary Asso.*, 162 Mich. App. 638, 643-644, 413 N.W.2d 79 (1987) (emphasis added).

Accord, Ashworth v. *Jefferson Screw Products, Inc.*, 176 Mich. App. 737, 745, 440 N.W.2d 101, *lv. denied* 433 Mich. 872, ___ N.W.2d ___ (1989).

In *Cuffe* v. *General Motors Corp., supra*, the Michigan Court of Appeals considered a claim by a disabled worker who claimed that he could physically perform another position to which he was entitled to be reinstated under the collective bargaining agreement. He alleged that the only reason that he had not been reinstated was because of handicap discrimination. In holding this claim preempted by Section 301, the court of appeals said:

> Here, regardless of plaintiff's claim of discrimination under the HCRA . . . [p]laintiff's claim was inextricably intertwined with the provisions of the labor management agreement, and in fact *his claim to the job he sought was based upon the guarantees of that contract.* Plaintiff's state-law claim is substantially dependent upon analysis of the terms of the collective bargaining agreement. Therefore, the grievance procedure provided by the contract affords him his exclusive remedy for disputes arising under that contract . . . *Id.* at 771 (emphasis added).

Accord, Metro v. *Ford Motor Company, supra; Desjardins* v. *The Budd Co.*, 175 Mich App. 599 (1988). In *Desjardins* the court of appeals said:

> In the present case, as in *Cuffe,* plaintiff's claim is grounded upon the collective bargaining agreement. *It is clear that but for defendant's recall agreement with the union, plaintiff would have no claim under the HCRA. Rancour* v. *Detroit Edison,* 150 Mich App 276; 388 NW2d 336 (1986), *lv den*

> 428 Mich 860 (1987). Thus, plaintiff's claim depends on the analysis of the terms of §47 of the collective bargaining agreement to determine what contractual duty defendant assumed and that question is preempted by federal law. 175 Mich. App. at 603 (emphasis added).

The Sixth Circuit in this case completely ignored the source of the respondent's asserted right to "return-to-work" and held, on the basis of its 8-7 *en banc* decision in *Smolarek* v. *Chrysler Corp,* 879 F.2d 1326 (6th Cir 1989), that *no* HCRA claim is *ever* preempted by Section 301, regardless of the nature of the particular claim being asserted. (App., *infra,* 3a). In *Smolarek,* the court held that two HCRA claims were not preempted because the plaintiffs were asserting a claim under a state anti-discrimination statute and the court interpreted *dicta* in *Lingle* to mean that state anti-discrimination claims are *never* preempted by Section 301. 879 F.2d at 1332. This is an incorrect reading of *Lingle* which, if allowed to stand, would seriously disrupt federal labor policy and the collective bargaining process.

As noted above, *Lingle* made plain that a variety of state law claims, even though representing *nonnegotiable* rights, would be preempted by Section 301 if, "at least in certain instances," they "turned on the interpretation of a collective-bargaining agreement." *Lingle,* 108 S.Ct. at 1882 n.7. The Court accordingly did not hold or suggest that Section 301 can never preempt discrimination claims. To the contrary, claims predicated on state anti-discrimination laws must be carefully scrutinized — as the Court scrutinized other state-law claims in *Lueck, Hechler,* and *Lingle* — to determine whether, "at least in certain instances, collective-bargaining agreement interpretation" is required for adjudication of the discrimination claim. *Id.* Indeed, the Court explicitly noted in *Lingle,* 108 S.Ct. at 1885, that anti-discrimination laws themselves "illustrate the relevant point for §301 pre-emption analysis" — whether "the existence or the contours of the state law violation [is] dependent upon the terms of the [labor] contract." While analysis of some state-law discrimination claims brought

by union-represented employees may show that they are not preempted, other claims clearly will be preempted, and respondent's HCRA claim in the present case in an archetypal example of a claim that is preempted. The apparent bright-line rule suggested by the court of appeals for discrimination claims is both wrong and inimical to the important federal policies underlying Section 301 preemption.

The court of appeals essentially held that a discriminatory *motive* is all that respondents need establish in a handicap discrimination case, and that establishing *motive* is unrelated to the terms of the bargaining agreement. This simplistic reasoning ignores the source of the claimed right to return-to-work which *in this instance* forms the basis of the HCRA suit — the collective bargaining agreement. Moreover, this Court in *Lueck*, 471 U.S. at 211, emphatically rejected the notion that the addition of a motivational factor (e.g., bad faith) to a contract-based claim would avoid preemption under Section 301.

Moreover, "motivation" is not the only *sine qua non* of respondent's handicap discrimination claim. There is no question that Michigan Bell was motivated by respondent's physical condition (or "handicap"), which it believed prevented her from adequately performing her former job, or any other available job for which she was otherwise qualified. That motivation alone does not make Michigan Bell's action illegal or discriminatory under the HCRA.[3] The real question is whether Michigan Bell was correct in this belief and, therefore, justified in denying her reinstatement.

However, because of respondent's admitted disability, respondent had no independent right to demand reinstatement to her former position or another position under the HCRA even if she were completely recovered from her disability and able to perform her former job. Her only right to demand reinstatement arose from the collective bargaining agreement. Therefore, the

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[3] This demonstrates the fundamental difference between handicap discrimination claims and other types of discrimination claims.

question of whether respondent was sufficiently recovered to be returned to her former job, or some other available job, is a *contractual* question, not one that can arise independently under the HCRA.

Thus, even if respondent's subsequent ability to work *could* be decided under state handicap law without express reference to the contract, allowing state-law to substitute a non-contractual standard for the enforcement of an entirely *contractual* right to return-to-work would constitute the very evil that this Court sought to prevent by its decision in *Lueck*. When the necessary effect of a state-law claim is to enforce a right created *solely* by a collective bargaining agreement, rather than a parallel, state-created right, the claim *must* be decided under the agreed contractual standard, not under state law. That is the very point of *Lueck* and *Lingle*.

In this case, Michigan Bell voluntarily undertook a contractual obligation to provide a disabled employee with up to one year of disability leave and benefits, and to return that employee to work under certain conditions if the disability is alleviated within one year. This obligation has no independent source in state law and goes beyond anything required by the HCRA. It would be ironic and unfair if, having undertaken a purely contractual obligation, Michigan Bell's performance of that obligation would be judged by a state statutory standard rather than by the contract terms under which the obligation arose. More importantly, not only would it be ironic and unfair, it would be fundamentally at odds with federal labor policy as set forth in *Lueck*.

Respondent seeks to define the meaning and scope of her *contractual* right to return-to-work, and Michigan Bell's corresponding contractual obligation, by reference to state law under the HCRA. Even though the right to reinstatement exists solely by virtue of the collective bargaining agreement, respondent would have Michigan Bell's performance of its contractual obligation measured by state handicap discrimination law. Because such an application of the HCRA "purports to give life to these

[contract] terms in a different environment, it is pre-empted." 471 U.S. at 219.

This Court should grant review in this case to clarify that a state-law claim that is dependent upon the enforcement of a collectively-bargained right or obligation *does* require contract interpretation, and is preempted by Section 301, because collectively-bargained rights and obligations can only be enforced under agreed contractual standards and through the grievance/arbitration process.

D. Resolution Of Respondent's State Law Claim Would Frustrate Federal Labor Policy Requiring Settlement Of Labor Disputes Through Arbitration.

The court of appeals' decision is not merely mistaken. It threatens to disrupt federal labor policy. If "state law [were] allowed to determine the meaning intended by the parties in adopting" the labor contract's provisions concerning accommodation, "all the evils addressed in *Lucas Flour* would recur." *Lueck*, 471 U.S. at 211. Michigan HCRA cases are tried to juries. Uniformity and predictability would accordingly be destroyed. State law as discerned by a local jury would be substituted for the "law of the shop." This "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lucas Flour*, 369 U.S. at 103.

The court of appeals did not consider the corrosive effect of its decision on one of the fundamental tenets of federal labor policy — the preservation of "the central role of arbitration in our 'system of industrial self-government.' " *Lueck*, 471 U.S. at 219, quoting *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). See also *Lingle*, 108 S.Ct. at 1884.

The established policy of peacefully resolving labor contract disputes through grievance arbitration, see Section 203(d) of the Labort Management Relations Act of 1947, 29 U.S.C. §173(d), is greatly undermined by the court of appeals' decision. To "permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend

it." *Republic Steel* v. *Maddox*, 279 U.S. 650, 653 (1965). "[I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." *Id.* The critical importance of this policy favoring dispute resolution through arbitration was recently affirmed in *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29, 36-38 (1987).[4]

Employers that have negotiated exclusive grievance arbitration procedures are denied the benefit of their bargain when, as here, they are forced to litigate in state court claims that are grounded in the contract and should be resolved through contractual procedures. As noted earlier, a multi-state employer that has negotiated a nationwide collective bargaining agreement could well have differing liabilities under the same contractual provision — depending upon the State in which it is decided or the local judge or jury that acts as fact-finder.

As is the case with other disputes over contractual rights and benefits, labor arbitrators are uniquely qualified to interpret and enforce the disability leave and return-to-work provisions of the Michigan Bell agreement. See *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 581-582 (1960); *Paperworkers* v. *Misco, Inc.*, *supra*. An arbitrator determined that respondent was entitled to be returned to work and awarded her reinstatement and back-pay. Under the court of appeals decision, however, even if the arbitrator had ruled that no return-to-work was available under the collective bargaining agreement, a judge or jury would be permitted to give a different interpretation to the contract as a basis for finding that she had been "discriminated" against.

In the final analysis, the issue in this case, as in many labor preemption cases, is not whether respondents may object to the manner in which they were treated by their employer, but in *what forum* they may object and *under what substantive law and procedures*. This Court has already answered that question: "in

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[4] See also *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

enacting §301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour*, 369 U.S. at 104. The decision below is out of step with this principle. It makes "the process of negotiating an agreement * * * immeasurably more difficult," *id.* at 103, and clearly jeopardizes "the Congressional goal of a unified federal body of labor-contract law." *Lueck*, 471 U.S. at 220.

II. The Court of Appeals' Approach Conflicts With That of Other Circuits

The court of appeals' adoption of a uniform rule that no HCRA claim (or any other discrimination claim) is ever pre-empted by Section 301 conflicts with the case-by-case approach mandated by this Court in *Lueck* and adopted by a number of other circuits. The sharp disagreement of the Sixth Circuit in its 8-7 *en banc* decision in *Smolarek* is mirrored by the conflicting approaches to Section 301 preemption analysis applied by other circuit courts.

The Seventh Circuit's approach in *Douglas* v. *American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989), demonstrates the conflict with the Sixth Circuit's approach. In *Douglas* the plaintiff alleged that she suffered from physical or medical conditions that prohibited certain work, and claimed that her employer had denied her excused work days, subjected her to unjustified scrutiny, and disciplined and threatened her with discharge without justification. *Id.* at 567-568. Rather than pursuing a grievance under her collective bargaining agreement, and rather than asserting a handicap discrimination claim as respondents did here, Douglas sued on a state-law theory of "intentional infliction of emotional distress." *Id.* at 568.

Properly applying this Court's holdings in *Lucas Flour*, *Lueck*, and *Lingle*, the Seventh Circuit ruled that Douglas' state-law claim was preempted by Section 301. The court of appeals reasoned that her claims, upon scrutiny, pertained directly to terms and conditions established by the collective bargaining agreement, such as excused work days, work scrutiny, discipline,

and discharge, and that "[r]esolution * * * will require a court to interpret the collective bargaining agreement in order to determine whether or not [her employer's] allegedly wrongful conduct was authorized under the collective bargaining agreement." 877 F.2d at 572.

In sharp contrast, the Sixth Circuit held here that even though respondent's HCRA claim related directly to rights provided solely by the collective bargaining agreement, an HCRA claim simply cannot be preempted by Section 301. In addition, also in conflict with the Seventh Circuit's *Douglas* analysis, the Sixth Circuit merely focused on the generic elements of an abstract discrimination claim (especially "motivation") rather than factually scrutinizing the particular claim being made, as mandated by *Lingle*, to determine its relationship to the labor contract.

The approach to Section 301 preemption utilized by the Eighth Circuit in *Johnson* v. *Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989), likewise conflicts with that of the Sixth Circuit. A union-represented employee there sued under eight separate state-law theories, all arising from his discipline and discharge from allegedly slashing tires in the company parking lot. Following the directive of *Lingle*, the Eighth Circuit scrutinized the factual proofs pertinent to each claim to ascertain whether it arose from the collective bargaining agreement or required its interpretation. *Id.* at 624-625. It held some claims preempted and others not. One libel claim was preempted because it implicated collectively bargained plant rules, and "any judicial resolution of this libel allegation would necessarily involve construction of the collective bargaining agreement." *Id.* at 624. But a second libel claim concerning a post-discharge communication was held not preempted because it required no contract interpretaton. *Id.* at 625. It is this claim-sensitive analytical approach, mandated by *Lingle* and *Lueck*, that the Sixth Circuit failed to undertake here.[5]

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[5] See also *Nash* v. *AT & T Nassau Metals*, 381 S.E.2d 206 (S.C. 1989), in which the South Carolina Supreme Court ruled that a union-represented employee's state-law tort and contract claims, stemming from his employer's

While the foregoing decisions held lawsuits preempted that had been packaged as state-law contract or tort claims,[6] rather than as handicap discrimination claims,[7] the factual and legal similarities between those cases and the instant one are manifest. The conflict in approach is also manifest. Regardless of an employee's choice of state-law labelling — be it "discrimination," "tort," or something else — "the relevant point for §301 pre-emption analysis" is whether "the existence or the contours of the state-law violation [is] dependent upon the terms of the [labor] contract." *Lingle* 108 S.Ct. at 1885. "Any other result would elevate form over substance and allow parties to evade the requirements of §301 by relabeling their contract claims" as state-law actions. *Lueck*, 471 U.S. at 211.

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actions following a disability, were all preempted by Section 301 because the claims turned on contractual benefits and procedures set forth in the collective bargaining agreement. The South Caroline Supreme Court admonished that the lower court, in rejecting Section 301 preemption, had "failed to follow the directive of *Lueck* • • • that preemption be decided on a case-by-case basis." *Id.* at 209. The same is true of the Sixth Circuit's opinion here.

[6] Other Section 301 preemption decisions adopting the approach utilized in *Douglas* and *Johnson* include *Jackson* v. *Liquid Carbonic Corp.*, 863 F.2d 111, 118 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 3158 (1989) (privacy claims preempted inasmuch as they "do not rest upon inalterable state-law rights which float free of, and therefore do not require interpreting, the collective bargaining agreement"); *Hanks* v. *General Motors Corp.*, 859 F.2d 67 (8th Cir. 1988) (wrongful discharge claim preempted, other claims remanded for consideration of specific factual allegations); *Newberry* v. *Pacific Racing Assoc.*, 854 F.2d 1142 (9th Cir. 1988) (breach of implied covenant of good faith preempted); *Laws* v. *Calmat*, 852 F.2d 430 (9th Cir. 1988) (constitutional claim challenging drug testing preempted).

[7] The Ninth Circuit has considered Section 301 preemption of "handicap discrimination" claims in two cases, *Miller* v. *AT & T Network Systems*, 850 F.2d 543 (9th Cir. 1988) (Oregon law); and *Ackerman* v. *Western Electric Co.*, 860 F.2d 1514 (9th Cir. 1988) (California law). These opinions — in which the Ninth Circuit held that claims were *not* preempted — are not pertinent because the state handicap discrimination statutes at issue *independently* required the accommodation sought by the employee, whereas the Michigan HCRA does not. See note 1, *supra*. The employees in *Miller* and *Ackerman* were accordingly relying upon statutory rights to accommodation which were "parallel" to any rights under a collective bargaining agreement. Compare *Lingle*, 108 S.Ct. at 1883, 1885. The opposite is true here.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1989

APPENDICES

Appendix A

No. 88-1675

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BARBARA CLEARY,
Plaintiff-Appellant,

v.

MICHIGAN BELL TELEPHONE CO.,
a Michigan Corporation,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan

(FILED August 2, 1989)

BEFORE: MARTIN and MILBURN, Circuit Judges; and HOLSCHUH, District Judge*.

PER CURIAM. Plaintiff-appellant Barbara Cleary ("plaintiff") appeals the summary judgement of the district court in favor of defendant-appellee Michigan Bell Telephone Company ("defendant") in this action alleging discrimination in violation of the Michigan Handicappers Civil Rights Act ("HCRA"), Mich. Comp. Laws Ann. § 37.1101 *et seq.* For the reasons that follow, we reverse and remand this action to the district court.

I.

Plaintiff commenced this action on August 17, 1987. In her complaint she alleged that defendant violated the HCRA by discharging her from her past position because of her handicap. Plaintiff also alleged defendant's conduct was extremely outra-

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* Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, sitting by designation.

geous, willful, wanton and reckless, and in violation of a collective bargaining agreement entered into between the Communications Workers of America, a union of which plaintiff was a member, and defendant.

Defendant moved for summary judgment, arguing that plaintiff's HCRA claim was completely preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and that plaintiff had failed to exhaust the grievance procedures as required under the collective bargaining agreement. The district court granted defendant's motion for summary judgment on May 31, 1988, and this timely appeal followed.

II.

A.

Plaintiff was employed by defendant in 1974. She worked as a maintenance administrator and was responsible for testing telephone circuits and completing basic output reports. On August 4, 1985, plaintiff was seriously injured in a nonwork-related accident. As a result, she was disabled and became unable to perform her job. She was granted a disability leave of absence pursuant to the collective bargaining agreement under which she received full disability benefits through August 10, 1986.

On August 6, 1986, plaintiff's personal physician released her to return to work subject to various physical restrictions. Plaintiff maintains that these restrictions would not have prevented her from fulfilling her past duties. On August 8, 1986, defendant's company doctor examined plaintiff and also released her to return to her employment with the restrictions outlined by plaintiff's personal physician.

Immediately after the company medical examination, plaintiff contacted her supervisor who allegedly told her that he would not allow plaintiff to return to work as she required use of a cane. Plaintiff alleges her employment was terminated on or about

August 8, 1986, because of her handicap which, according to plaintiff, would not have interefered with her ability to perform her job.

B.

The only issue on appeal is whether plaintiff's claim under the HCRA is preempted by section 301 of the LMRA. We find that this issue is resolved by our en banc decision in *Smolarek v. Chrysler Corp.*, ___ F.2d ___ (6th Cir. ___) (en banc) (slip op. Nos. 86-2074/87-1387, July 12, 1989). In *Smolarek* we held that claims under the HCRA are not preempted by section 301 as they do not necessitate interpretation of the collective bargaining agreement. In the present case, we likewise hold that even though the plaintiff has implicated the collective bargaining agreement, no interpretation of the collective bargaining agreement is required to resolve her HCRA claim. Thus, plaintiff's HCRA claim is "independent" of her rights under the collective bargaining agreement and is not preempted by section 301.[1] *See Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877, 1882 (1988).

III.

Accordingly, the judgment of the district court finding plaintiff's HCRA claim completely preempted by section 301 of the LMRA is REVERSED, and the case is REMANDED for

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[1] The fact that plaintiff in this case has included in her complaint a claim under the collective bargaining agreement does not require a different result. As we stated in *Smolarek*, "[e]ven if [plaintiff] . . . charge[d defendant] . . . with a violation of the collective bargaining agreement . . . this does not mean that § 301 preempts the [HCRA] claim." ___ F.2d at ___ . Whether plaintiff's claim under the agreement fails for failure to grieve is not before us in this appeal.

further proceedings. We intimate no view as to the ultimate outcome of this action.

ISSUED AS MANDATE: September 12, 1989
COSTS: NONE

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By (s) Tom Benningus
Deputy Clerk

Appendix B

No. 88-1675

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BARBARA CLEARY,
Plaintiff-Appellant

v. ORDER

MICHIGAN BELL TELEPHONE COMPANY,
Defendant-Appellee

(FILED September 1, 1989)

This matter is before the court upon consideration of the appellee's petition for rehearing of the court's per curiam opinion reversing the decision of the district court, as well as the motion to supplement the record contained within the petition.

Having carefully examined the petition, the court finds it misapprehended no question of law or fact in its opinion.

It is **ORDERED** that the petition for rehearing and the motion to supplement the record be, and they hereby are, **denied.**

ENTERED BY ORDER OF THE
COURT
(s) Leonard Green, *Clerk*

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BARBARA CLEARY,
Plaintiff,

-vs-

MICHIGAN BELL TELEPHONE COMPANY, a Michigan Corporation,
Defendant.

C.A. No. 87CV73433DT
HON. ANNA DIGGS TAYLOR

JUDGMENT

At a session of said Court held in the Federal Building, Detroit, Michigan on May 31, 1988

PRESENT: HON. ANNA DIGGS TAYLOR
U.S. District Judge

The Court having read the Briefs of the parties, having heard oral argument, and being otherwise advised of the premises,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion For Summary Judgment is granted, and this matter shall be dismissed with prejudice.

ANNA DIGGS TAYLOR
U.S. District Judge

(2)

No. 89-844

In The

Supreme Court of the United States

October Term, 1989

MICHIGAN BELL TELEPHONE CO.,

Petitioner,

v.

BARBARA CLEARY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

I. WHETHER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. SECTION 185, PREEMPTS A STATE-LAW HANDICAP DISCRIMINATION CLAIM, THE RESOLUTION OF WHICH DOES NOT REQUIRE INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT?

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COUNTER-STATEMENT

On August 14, 1987, Respondent (Plaintiff), Barbara Cleary, filed a Complaint against Petitioner (Defendant), Michigan Bell Telephone Company, in Michigan's Wayne County Circuit Court alleging discrimination under Michigan's Handicappers Civil Rights Act (HCRA).

On June 17, 1984, Cleary commenced employment with Michigan Bell. Thereafter, and at all times materially relevant to this action, she performed her duties as maintenance administrator in a manner which met or exceeded the Defendant's legitimate business expectations. On August 4, 1985, Cleary suffered non-work related injuries as a result of a motor vehicle accident temporarily disabling her from her employment and for which Michigan Bell authorized a sickness disability leave of absence. On August 6, 1986 Cleary's family physician released her to return to work at her place of employment with restrictions which would not have interfered with her ability to perform her job. Michigan Bell's company doctor examined Cleary on August 8, 1986 and released her to return to her employment with the restrictions as outlined by her personal physician.

After the company medical exam, Cleary contacted her supervisor and was told by a second line supervisor, Jerome Malinowski, that he could not let her come back to work in his department because she required the use of canes, and he would not allow anyone to work in his department with canes. Malinowski terminated Cleary allegedly because of the medical restrictions. He neither knew nor understood the parameters of the medical restrictions, there were no special physical requirements

for Cleary's job of maintenance administrator, and the medical restrictions would not have prevented Ms. Cleary from performing her job as a maintenance administrator.

In her Complaint, Cleary alleged that Michigan Bell, in refusing to allow her to return to her position as maintenance administrator, violated its duty under the HCRA by wrongfully terminating her because of physical characteristics and/or handicaps which were totally unrelated to her ability to perform her duties as maintenance administrator.

On August 27, 1986, Cleary's union, the Communication Workers of America, (AFL-CIO), filed a grievance claiming that Michigan Bell unfairly terminated her because of her handicap. The union's charge was that there was no effort made to find her another job. The grievance proceeded through arbitration. The only issue arbitrated was whether the company improperly terminated Cleary. The arbitrator ultimately ruled that Cleary was improperly terminated. While Cleary has been reinstated to her former position, she has not received back pay nor has she received damages which are compensable under Section 1606 of the Michigan's HCRA.

The District Court ruled that under the case of *Allis-Chalmers Corporation vs. Lueck*, 471 U.S. 202 (1985), the federal law had preempted the Michigan state statute prohibiting handicapped discrimination and granted Defendant's Motion for Summary Judgment. On appeal to the Sixth Circuit, the Sixth Circuit panel in a per curiam opinion held that Cleary's claims under the HCRA are not preempted by Section 301 because no

interpretation of the Collective Bargaining Agreement (CBA) is required in order to resolve the HCRA claim. Thus, Cleary's HCRA claim is "independent" of her rights under the CBA and is not preempted by Section 301.

The only issue on appeal to the Sixth Circuit was whether Cleary's claim under the HCRA is preempted by Section 301 of the LMRA. The Sixth Circuit panel found that the issue was resolved by its en banc decision in *Smolarek vs. Chrysler Corporation*, 879 F.2d 1326 (Sixth Cir 1989), in which it held that claims under the Michigan HCRA are not preempted by Section 301 as they do not necessitate interpretation of the CBA.

In *Smolarek*, the Plaintiff claimed that his employer violated the HCRA by refusing to return him to his former position or another position consistent with his medical restrictions and maintained him instead on a disability layoff indefinitely. The facts in the instant case are even stronger that those contained in *Smolarek*. In this case, Plaintiff has not claimed any right to reinstatement under the CBA. On the contrary, Cleary was released to return to work with restrictions that would not have affected her ability to perform her job and was prohibited from returning to work and terminated because of the restrictions that were unrelated to her ability to perform her job.

In *Smolarek*, a Petition for Certiorari is now pending. While Michigan Bell has taken great pains to distinguish this case from *Smolarek*, the fact is that the decision in *Smolarek* controls whether this case is preempted by Section 301. The Sixth Circuit, relying on *Lingle vs. Norge*

Division of Magic Chef, 486 U.S. ___, 108 S.Ct. 1877 (1988), properly held that a state law of Michigan HCRA claim is not preempted by Section 301.

REASON FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied for the reason that:

I. The instant case is consistent with this Court's prior decisions.

I. THE INSTANT CASE IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

In *Allis-Chalmers Corporation vs. Lueck*, 471 U.S. 202 (1985), this Court held that an employee's state-law tort action is only subject to preemption by Section 301 if it is substantially dependent on analysis of the terms of the CBA. Cleary's state-law claim of handicap discrimination, as well as the defense to that claim, is not dependent on, nor does it require analysis of the CBA.

In *Lingle vs. Norge Division of Magic Chef*, 486 U.S. Ct. 1877, 100 L.Ed. 2nd 410 (1988), a union employee sued her employer, alleging she was discharged in retaliation for filing a worker's compensation claim. In a separate proceeding, Plaintiff also took advantage of the CBA grievance procedure, and won reinstatement with back pay at arbitration.

In *Lingle*, this Court permitted the unionized employee to use the CBA grievance procedure and at the same time proceed to enforce her rights under state law. In a unanimous opinion holding that the state claim was

not preempted by Section 301, this Court noted that the issues raised by the state law claim did not require interpretation of the CBA:

> To show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge, and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the act or to interfere with his exercise of those rights. Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employee. Neither of the elements require a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a non-retaliatory reason for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is 'independent' of the collective bargaining agreement in the sense of 'independent' that matters for Section 301 preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." (citations and footnote omitted).

As in *Lingle*, resolution of the state law claim for handicap discrimination involves purely factual questions without any need for interpretation of any CBA provisions.

The HCRA creates a statutory cause of action for violation of certain enumerated employer prohibited practices. Specifically, the statute prohibits employers from discharging employees because of a handicap that is

unrelated to the individual's ability to perform the duties of a particular job or position. The Complaint sought damages for Michigan Bell's wrongful termination of Cleary because of physical characteristics and/or handicaps unrelated to her ability to perform her job in violation of the HCRA. The Sixth Circuit correctly held that resolution of Cleary's state law claim does not require interpretation of the CBA. The issues in this case are purely factual and concern simply whether Cleary was terminated from her position as maintenance administrator because of physical characteristics and/or handicaps unrelated to her ability to perform her position.

The proofs necessary to establish prima facie liability under HCRA are (1) that Michigan Bell took adverse employment action against Cleary, and (2) that the actions were motivated because of her physical characteristics and/or handicaps.

Since resolution of Cleary's state law HCRA claim does not require interpretation of the CBA, the Sixth Circuit's decision that it is not preempted by Section 301 is fully consistent with prior decisions of this Court. Federal preemption does not apply so long as the state claim can be resolved without interpretation of the CBA. *Lingle,* 108 S.Ct. at 1885.

Even though the CBA is implicated in the Complaint, no interpretation of the CBA is required to resolve Cleary's HCRA claim. This Court noted in *Lingle* that "The mere fact that a broad contractual protection against discriminatory – or retaliatory – discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state

law violation dependent upon the terms of the private contract." *Lingle*, 108 S.Ct. at 1885.

Thus, it is clear that claims under the Michigan HCRA which do not necessitate interpretation of a CBA are not preempted by Section 301. The Sixth Circuit in *Smolarek* relied upon the guidelines set forth by this Court in *Lingle*. Cleary's state law remedy under the Michigan HCRA is "independent" in the sense that matters for Section 301 preemption, i.e. resolution of her claim does not require construing the CBA.

The Sixth Circuit correctly applied the tests for preemption established by this Court.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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